No. 17010

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL 208, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA; AND LOCAL 123, FURNITURE WORKERS, UPHOLSTERERS AND WOODWORKERS UNION,

Respondents.

Brief on Behalf of Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and Local 123, Furniture Workers, Upholsterers and Woodworkers Union.

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Statement Regarding Jurisdiction.

The respondents adopt the petitioner's statement concerning jurisdiction.

Statement of the Case.

The issue in this case is whether the respondents Local 208, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as 208; and Local 123, Furniture Workers, Upholsterers and Woodworkers Union

hereinafter referred to as 123) violated Section 8(b)(2) of the National Labor Relations Act as amended. The Board held that there was such a violation predicated upon its finding that the respondents picketed Sierra Furniture Company, hereinafter referred to as Sierra, in an attempt to coerce it into executing a union shop contract. The Statement of the Case in petitioner's opening brief is incomplete and in part misleading by reason thereof. A detailed and complete statement of the facts is essential to the adequate consideration of this case.

A. 1956 Organizational Efforts of 123.

In 1956, 123 signed up a majority of the employees of Sierra and made a demand for recognition. At that time the company was not engaged in interstate commerce and an NLRB election, therefore, could not be obtained. The company refused to deal with 123 and in consequence no collective bargaining relations were established. [R. 114, 115, 122-3.]

B. The Commencement of the Joint 1958 Organizing Campaign.

In May or June of 1958, 123 together with 208 began joint activities to organize the employees of Sierra as well as of other furniture companies in the area. [R. 114-16, 140-1, 123.] Cards designating 123 as the collective bargaining representative were ultilized at Sierra and were circulated among the employees. [R. 115-16.] Representatives of both unions participated in the organizational activities. [R. 115-16.] They used 123 cards on behalf of both 123 and 208 as they had available only one form of card. [R. 140.] Em-

plyees of Sierra were informed that the 123 cards were bng used to designate both unions and that 123 or 2(8 were working together to attain joint bargaining rihts. The whole campaign was conducted upon the bsis of informing the employees of Sierra that the orgnizing was being carried on by 123 and 208 as a joint e.ort. [R. 139-41.] By July 21, a total of 33 out o' the 60 employees of the company had signed such dsignation cards. [See 123's Exs. 2A, 2C, 2D; also se R. 13.]

On Friday, July 18, a meeting was held at the home o one of the Sierra employees. There were 28 or 30 eiployees present plus representatives of 123 and 208. Gs O. Brown, Business Agent for 123, reiterated to te workers that 123 and 208 were jointly organizing Serra, along with other furniture plants in the area ad that they represented a majority of the workers a Sierra by reason of the cards that the workers had sgned. [R. 120-3.] He told them about the failure c previous organizational attempts and of the inability c 123 without the support of 208 to obtain recognitn despite its signing up of a majority of the empoyees. He stated that now they could get an election lom the Board but that in view of the unfair labor practices which had been committed by Sierra (dissed *infra)* there could not be a fair election. He so stated that the employees could not expect voluntry recognition because of the company's refusal to eal with 123. The only available alternative, he said, as to strike the company. [R. 121-3, 151-2, 157.]

C. The First 1958 Demand for Recognition.

On July 16 or 17 Brown of 123 called Reybock Lewis, President of Sierra, and told him that "we" represented a majority of his employees and desired to discuss the question of recognition and a contract. Lewis told Brown that he was going out of town and suggested that he call Mr. Seese, the Vice President of the company. [R. 123-4.] Later the same day Brown did contact Seese and was referred by him to Mr. Feldman, the attorney for the company, who had acted in that capacity in 1956. [R. 124-5.] Feldman when he was contacted by Brown, said he would have to check with the company in order to ascertain its position. [R. 125.] When Brown spoke to Feldman a few days thereafter (but not later than July 21) he told him that "we were making the demand on behalf of Local 123 and Local 208 jointly." [R. 126.] Brown's testimony regarding his conversations with Feldman stands without contradiction.

D. The July 21 Demand and the Refusal to Bargain.

As has been indicated above, by July 21 a majority of the workers of Sierra had signed designation cards. On that date Brown telephoned Feldman and renewed the demand for recognition and bargaining on a joint basis. Feldman said that he had Lewis on another phone and queried Brown either as to the number of cards that had been obtained or the number of people they considered to be in the unit in determining whether they had a majority, indicating that he wanted to check the union's claim to a majority with Lewis. Brown gave Feldman the requested information. Feldman left the phone for a moment and came back and said that

Brwn's information was correct (indicating that the uion's claim to a majority was well founded as indeed it vas) but that the company did not want to recognize or deal with 123 because it had a reputation for "retty tough dealing." [R. 125-8.] The only witness to this claimed refusal to bargain other than Brown was Feldman who was never called as a witness by either the company or the Board. Brown's testimony as to this conversation not only stands uncontradicted but is aled by the inference that if it were in fact untrue, Fldman would have been called to testify to the actual fcts. The Trial Examiner accepted *in toto* Brown's vrsion of the above conversation. [R. 15.] To the etent that the Board dealt with these facts, it also acepted Brown's testimony on this score. [R. 36.]

On the day after the last mentioned phone conversation between Brown and Feldman, the former wrote to te latter confirming said phone conversation "wherein I advised you that we have revised our request for recognition" and are jointly requesting recognition with local 208. [General Counsel's Ex. 15.] A prior request had made no reference to Local 208. [General Counsel's Ex. 14.]

E. The Unfair Labor Practices Preceding the Strike.

In addition to the statement of Sierra representatives that the company would not bargain with 123, regardless of its representation of a majority, foremen conducted a campaign against 123.

Preceding the July 22 strike, Sierra through its foreman, Alex Alviso, stated to employees, singly and in groups, that 123 was a weak and ineffectual union and

solicited them to abandon 123 and to join another union with national affiliation, or to form a company union. On one occasion he stated to an employee that Sierra employees would lose profit sharing benefits then enjoyed if they joined 123. Foreman Laity advocated to employees abandonment of 123 for another union which he advised was stronger. Sierra Superintendent Lloyd Seese asked an employee why she did not join a union which he named and which he said was stronger than 123. [Findings of Trial Examiner; R. 13-14.]

F. The July 22 Strike.

Faced with these unfair labor practices and the company's refusal to bargain with 123, the two locals established a joint picket line at 7:00 a.m. on the morning of July 22 with approximately 28 of the employees of the company on the picket lint. Pickets carried signs indicating that the picketing was being conducted jointly by the two unions. [R. 173-4, 175, 148 127-8, Findings of Trial Examiner, R. 5, Par. 3.]

G. The July 22 R. N. Petition.

Sierra filed a petition for an election with the Board on the same day on which the strike began, naming 123 and 208 as having demanded representation. [R. 5.] It should be noted that this petition was filed immediately after the picket line was established and after the unfair labor practices of the company had forced the strike action which was supported by slightly less than

majority of the employees then working for the company. Thus the petition was filed immediately after it appeared that the unions did not have a majority who were willing to support it by going out on strike.[1]

H. Continuance of Unfair Labor Practices After Strike Began.

The Trial Examiner found on the basis of undisputed and credible testimony that during the July 22 strike unfair labor practices of the company were prevalent. On at least one occasion Alviso (company foreman) addressed a group of employees engaged in picketing and urged them to get the key people engaged in the strike and without informing the union to form a committee of their own for meeting with management. During the strike Superintendent Seese told employees engaged in picketing that the employees had no chance with 123; that 123 did not have enough power and Sierra would never sign a contract with it. [R. 14.]

Such practices on Sierra's part were obviously designed and had the reasonable effect of undermining the prestige of Local 123 and of destroying its majority. These facts and findings were ignored by the Board.

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[1]Even to the uninitiated, it would appear obvious that employees who have gone through a picket line are not very likely to vote for the union whose picket line and strike activities they disregarded—even though prior to the strike they had designated the union as their collective bargaining representative and had intended to support it.

I. Meetings Between Company and Unions During First Week of Strike.

A few days after the July 22 strike began, a company representative, representatives of 123 and 208 met at Feldman's office. At this meeting the unions offered to prove that they represented a majority of the employees by a card check. Again they were told that 123 was too tough and that the company did not want to deal with 123. [R. 133-4.] This testimony stands uncontradicted as does all of the evidence concerning the conversations with Feldman. [See Trial Examiner's Findings; R. 16.] On several occasions during this period both Lewis and Feldman said they would not deal with Brown or 123. [R. 150-1.] Brown had telephone conversations with Feldman during that period in which Feldman reported to Brown that with respect to recognition by Sierra "there was no change in the situation." [Trial Examiner's Findings; R. 16.] These facts and findings were ignored by the Board.

J. Disclaimer by Local 123.

Two letters were prepared and sent to the company simultaneously (one dated July 30 and the other July 31). The July 30 letter [Local 123's Ex. 3] was one from 208 to Sierra to the effect that whereas the former had been notified by 123 of its disclaimer of any and all interest in representing the employees of Sierra and whereas Local 208 represented a majority of the maintenance and production workers of said company that 208 requested exclusive recognition for collective bargaining purposes. The July 31 letter [General Counsel's Ex. 13] was one from Local 123 to Sierra disclaiming any and all interest in representing the employees of that company.

The two letters relative to 123's disclaimer were part o a single collective action designed to circumvent the eployer's illegal objections to 123 and to secure recog rtion for the union with which the employer was ap rently willing to deal in order to permit the two un ins to effectuate their joint representation of the em oyees. This is borne out by the fact that on August a contract was executed by and between Local 208 ad Sierra (discussed *infra)* which incorporated by rference Local 208's standard contract with respect to rtain employees and with respect to all other employees corporated the terms and conditions of Local 123's andard contract. Brown participated in both the ne otiations and the administration of the 208 contract a representative of 208. [Trial Ex. Findings; R. 9.] The Board ignored those facts and findings.

Following the delivery of the two letters the picket ne signs were changed to refer to 208 only. The strike as not sanctioned by the Teamsters Council until after 23 had withdrawn, but later on, during the second trike the Council sanctioned the joint activity of the wo unions. The failure to obtain the Council's sanc ion during the first strike was one of the reasons for he disclaimer, but not the principal one—which was to void the effect of the company's unfair labor practices y securing recognition of 208 with the understanding hat the two unions nevertheless would continue to act ointly. [R. 148-9; also see Trial Ex. Finding; R. 18.] These findings were not disturbed by the Board. In leed, they were based on Brown's testimony, the credi ility of which the Board accepted. [R. 47-8.]

K. The Signing of 208 Cards by Strikers.

Pursuant to the aforementioned joint program of seeking representation status for 208, union representatives decided that 208 cards should be signed in addition to the 123 cards that had already been signed. Accordingly they circulated 208 cards. The fact that Brown was one of the union representatives who handed out and secured signatures to the Local 208 cards provides further evidence of the joint nature of the organizing efforts of the two unions. [R. 145-7.]

L. The August 7 Contract.

Lewis, after having initially refused to meet with Brown [R. 135], did meet with Brown, Fitzpatrick and Chavez as 208 representatives. [R. 135-6.] At a subsequent meeting on the following day at which Lewis, Seese and Feldman were present, as well as Brown, Fitzpatrick and Chavez, a contract was executed between 208 and Sierra. [R. 135; See General Counsel's Ex. 7.] Brown the 123 Business Agent, signed that contract on behalf of 208. [R. 136.]

The character of the agreement concluded is significant [General Counsel's Ex. 7] because it indicates that as a practical matter the two unions obtained for the employees the benefit of joint collective bargaining by the two unions. Paragraph III of that agreement established wage rates for warehousemen, truck drivers and shipping department employees, and incorporated for this purpose by reference a Teamsters contract: wages and all of the terms and conditions of employment for all other employees were established by incorporating by reference the standard Local 123 contract.

[ar. 4 of General Counsel's Ex. 7.] By this unusual y: obvious device the unions lived up to their pledge t the employees that despite the formal negotiations by 28 the terms and conditions which were being sought b the two unions would be incorporated in any collec- t e bargaining contract negotiated with the company.

Approximately one week after the contract was en- t ed into Local 208 withdrew unfair labor practice arges which it had filed against Sierra on August [R. 6.]

I. The Filing of Charges by Jack Green, an Employee of the Company, and Local 123's Withdrawal of Disclaimer.

On August 25, about two weeks after the strike was ttled, a Sierra employee filed charges against 208 and erra alleging in effect that 208 executed a contract ith Sierra at a time when it did not represent a ma- rity of Sierra's employees and that the contract con- ined a union shop provision. On September 3 Sierra oke off recognition of 208 and at no time thereafter cognized the respondents either jointly or individually the bargaining representatives of the employees. [R.]

Also, on September 3, 123 sent a letter to Sierra in- rming them that the original disclaimer had been given the company because of its refusal to bargain with 23 and in order to avoid the long delays which were evitable if the unions relied on an unfair labor prac- ces proceeding to vindicate their rights. The letter urther stated that in view of the company's continued nfair labor practices and refusal to abide by the con- ract with 208, the disclaimer was being withdrawn

and the two unions were reasserting their demand for joint recognition. The letter requested a meeting to discuss the status of the 208 contract and for the purpose of engaging in collective bargaining generally and without limitation. [123 Ex. 4.] Thus the purpose of the disclaimer having been defeated it was withdrawn.

N. Unfair Labor Practice Charges Filed by 123 Against Sierra on September 4, 1958.

On September 4, 1958, in Case No. 21-CA-3204, Brown filed with the Board a charge alleging that Sierra violated 8(a)(1) of the Act, in interfering with 123's self organization. Via amendment 208 was brought in as one of the charging parties. In the amendment it was also alleged that Sierra had refused to bargain with the unions who were acting jointly in violation of 8(a)(5) of the Act, commencing as of July 21 and continuing thereafter.

O. The Second Strike.

On September 22, 1958, 208 sent a letter to Sierra threatening a strike unless the company met and negotiated with the two unions. [General Counsel's Ex. 6.] The company refused to meet and a picket line was established on September 24, with the pickets carrying signs indicating that the strike was a joint one of the two unions. [R. 64-66.]

During the strike notices were distributed by the two unions which, among other things, requested support through a consumer boycott and called for such support for two reasons:

First, the refusal of the company to recognize and deal with the two unions; and

Second, the pending unfair labor practice charges aainst the company [General Counsel's Ex. 9; R. 12.][2] It thus appears that the purpose of the second s·ike was to secure recognition and bargaining by the t o unions and to protest the unfair labor practices c the company.

P. Meetings of September 25 and January 6.

On September 25 a meeting was held in Richter's ffice, at which were present representatives of the t·o unions and of the company. One of the subjects scussed at this meeting was the basis of the picketing, cluding the relationship of the unfair labor practices nd the right to picket. [R. 96-7.]

Throughout the meeting the unions took the posi- on that there had been a joint organizing drive and aat the 123 cards had been signed by the employees or the purpose of having both unions represent them. R. 75.] The company suggested that the question f representation be settled by an election and the nions were asked why they would not consent. The eply was that they could not because a fair election as impossible by reason of the clear unfair labor prac- ces both with regard to the refusal to bargain with 23 and the other misconduct of the company. The nions took the position that these unfair labor prac- ices had resulted in a loss of majority which elimin-

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[2]On January 21, 1959, in respect to Case No. 21-CA-3204, the Regional Office made a determination that the unions' 8(a)(1) llegations had merit and a settlement from the company was ob- ained by the Board. The Regional Office held that the 8(a)(5) harges should be dismissed. Neither of the two unions joined n the aforementioned settlement agreement because they objected o the dismissal of the 8(a)(5) charges. [R. 108-111.]

ated an election as a proper way of settling the question of representation. [R. 66-7, 78-81, 88-9.]

The unions said that they wanted to negotiate a new contract based on the August 7, 1958, agreement because of the doubts which had been urged as to whether 208 alone represented the employees. The attorney for the company raised questions as to whether the two unions together had a majority in light of pending unfair labor charges directed against the August, 1959, contract with 208. The unions replied that they could show a majority as of July 22 although 208 conceded that thereafter it had lost its majority. It was also stated that if a new contract was entered into it might be conceded that the 208 contract was invalid. [R. 86-8.]

Despite the fact that the Board rejected the Trial Examiner's conclusion that as of September, 1958, the unions were not insisting upon a union shop, the Board said that "it is unnecessary in reaching our contrary conclusion to disturb the Trial Examiner's implicit credibility findings." [R. 46.] The Trial Examiner found that with respect to the unions as of September, 1958: "All that is established by predominance of the credible testimony in this case is that the respondents sought through economic pressure to force Sierra *to bargain* with them on a contract which would include, *inter alia,* bargaining on a union security provision." [R. 26.]

Another meeting between the interested parties was hd on January 6, 1959, at which time the question o a union shop was discussed. Lewis expressed the cncern that the company might lose certain employees vio would not join the union. [R. 93.] The unions tpk the position that the problem could be solved by igotiation. [R. 93, 103.] Simpson, a company repsentative, testified that at that meeting a union atrney said "if we really want to negotiate about this tere should be some way of working out this problem union security." [R. 105, 28.] Further Lewis aduitted that respondents at no time stated that they ould not sign a contract which did not contain a nion shop provision. [R. 27.]

It should be noted that the unions at other meetings roposed the possibility of negotiating a "maintenance f membership" clause as part of a collective bargaing agreement thereby further indicating that they did pt flatly insist on a union shop. [R. 91-2, 98, 162.] here was a dispute as to whether Brown suggested ne possibility of an open shop clause. [R. 161-2.] s far as the union shop was concerned at these meetgs the unions made it clear that what they were deanding was negotiation of a new contract and that ney were willing to discuss and negotiate all of its rms including provisions relating to union security. R. 26-8, 83, 103-5, 160-2.]

Every proposal made by the union was rejected and he company was willing to settle the dispute only by

an election. Thus there was no softening of the company's position, with respect to its refusal as a practical matter to deal with Local 123. It was this position of the company rather than any adherence to a specific union security clause which led to the breakdown of negotiations.

Q. January Meeting at Board's Office.

In about the middle of January there was a meeting at the Board between Brown, Lewis and Schwartz, a Board attorney. Brown said at that meeting that he felt it was possible that we might settle this situation and he thought that if the company could make a statement to its employees that it had no objections to them joining *"123 or 208 or any other union,"* that although the union had no majority at that time that in a couple of days they could have a majority. [R. 70-1.] At a later meeting that same day Margolis, 123's attorney, restated that if Sierra would inform its employees that it had no objection to their joining 123 or 208 and said if there would be no hinderance in any way he felt the unions could obtain a majority. But the unions refused to withdraw their picket lines and refused to accept a time limit to enlist the current majority. Richter, the company's attorney, said he felt that was somewhat ridiculous and that maybe the best thing to settle the whole thing was to have an election. [R. 71-2.]

Nothing came of these discussions. Once more it was clear from the conduct of the company that it was unwilling to enter into a contract to which 123 was a party. The picketing herein was stopped as a result of a temporary restraining order issued by the federal court at the behest of the Board.

Summary of Argument.

Respondents by their picketing of Sierra did not violate Section 8(b)(2) of the Act for the reason that the picketing here involved was engaged in for the purpose of obtaining recognition and negotiating only. Section 8(b)(2) does not properly come into play here because at no time did the respondents attempt to cause the company to discriminate against any employees. Demands for recognition and negotiations do not constitute demands for discrimination.

The evidence is insufficient to support the Board's order because it shows that respondents obtained a majority of the company's employees only to lose it, as a result of the company's unfair labor practices. Finally, the legislative amendments to the National Labor Relations Act embodied in the new Section 8(b)(4) of the Act have so modified the law with respect to picketing where a purpose of the picketing is recognition that the proposed Board order is no longer appropriate assuming even that it was appropriate prior to the amendments.

ARGUMENT.

I.

Respondents Did Not Violate Section 8(b)(2) of the Act.

The Board argues that respondents violated Section 8(b)(2) of the Act (Board's Br. pp. 14-17) on the ground that their picketing was engaged in not only for the purpose of obtaining recognition, but was also designed to obtain a union shop. In each case cited by the Board (Board's Br. pp. 14-16) the union or unions involved were attempting to secure a great deal more than just negotiations for a contract with a union shop as one of the demands to be negotiated. In *NLRB v. I. U. of O. Engineers,* 237 F. 2d 670, the union engaged in a work referral program which discriminated against non-union employees. In *Radio Officers' Union etc. v. NLRB,* 347 U. S. 17, the union removed an employee from their seniority list which resulted in discrimination against that employee. In *NLRB v. Local 55,* 218 F. 2d 226, the union sought to coerce subcontractors not to hire non-union employees, and attempted to compel the contractor to sign a collective bargaining agreement which incorporated by reference Union Work Rules prohibiting a union member to work alongside a non-union worker.

Both *NLRB v. Operating Eng'rs etc.,* 266 F. 2d 905, and *NLRB v. U. A. of Journeymen,* 112 NLRB No. 177, p. 1385, involved economic pressure applied by a union against a contractor specifically designed to coerce subcontractors to cease hiring non-union employees. Each of the above referred to Board cases, as well as those cases cited by the Board (Board's Br. pp. 15-16) not discussed here involved either picketing or some

other form of pressure by a union employed for the *immediate and direct purpose* of securing some direct discrimination or some form of closed, or union, shop, as distinguished from negotiations concerning a union security clause.

Respondents submit that none of the above mentioned cases are controlling for the reason that the instant action involved peaceful picketing for the purpose of obtaining recognition and bargaining only. The record establishes that respondents struck Sierra because of the refusal of the latter to deal with the unions.

The Board's finding that the picketing was motivated by union shop demands ignored the labor relations history of this case and magnified the significance of one portion of a series of discussions between the interested parties. That the parties discussed union security and that the respondents argued for union security in those discussions does not prove that the unions picketed for union security. An examination of the entire record indicates that the stalemate between the parties did not arise as a result of the demand for the union shop or any other demand. At no time was there any statement made by the unions either that they would start or that they would continue picketing unless a union shop was granted. To the contrary, the unions at all times indicated that the issue was one which was negotiable just as were all of their other demands.

Section 8(b)(2) does not come into play here for the further reason that at no time did the unions attempt to cause the company to discriminate against any of their employees. There was no demand that any

employees be discharged or otherwise discriminated against unless they joined one of the respondent unions. A demand in negotiations for a form of union security—particularly where it is indicated that the precise form of the contract clause is subject to negotiations—cannot be an attempt to discriminate against any employees because it does not and cannot call for any such act of discrimination by the company. It might be argued here on the face of the entire record that one of the reasons for the picketing was the refusal of the company to bargain with the respondents concerning the kind of a union security clause to be incorporated in a collective bargaining agreement (this, of course, as part of a refusal to bargain at all on any issue). But such a demand is at least one step removed from any attempt to cause discrimination against employees. Such an attempt can come about only if and when the clause is negotiated and action is demanded upon the basis of such a provision. Until the form of the clause is known and a demand is made or a requirement is created which if complied with would result in discrimination, there is obviously no attempt to discriminate.

In all of the cases relied upon by the Board, the picketing had as one purpose the compulsion of immediate acts of discrimination against employees. Moreover, all of the cases were decided before *NLRB v. Drivers Local No. 639,* 326 U. S. 274, in which the Court ruled that recognitional picketing by a minority union did not constitute a violation of Section 8(b)(1)(A) of the Act. This holding was predicated upon the clearly recorded intent of Congress not to limit the right to strike and picket except to the extent clearly

orbidden by the law.[3] The Supreme Court said in hat case:

> "We conclude that the Board's interpretation of Section 8(b)(1)(A) finds support neither in the way Congress structured 8(b) nor in the legislative history of 8(b)(1)(A). Rather it seems clear, and we hold, that Congress in the Taft-Hartley Act authorized the Board to regulate peaceful 'recognitional' picketing only when it is employed to accomplish objectives specified in Section 8(b)(4); and that Section 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, and reprisal of threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes."
>
> 362 U. S. at 290.

It would appear to be clear from this language that as long as the basic purpose of the picketing is recognitional, it is immaterial (except for demands which violate Section 8(b)(4)) what demands the union makes for the purpose of negotiations. The picketing in such a case is legal despite the fact that recognition of the union until such time as it attains a majority is illegal. It follows therefore that the legality of a demand for negotiations is not a precondition of the right to picket for recognition and negotiations.

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[3]It was upon the basis of this decision that the Board in the instant case set aside that portion of its order which was predicated upon the Board's conclusion that the picketing demanding negotiations by the two unions violated Section 8(b)(1)(A) of the Act.

What the Board has done here is to equate a demand for recognition and negotiations with a demand for discrimination. The Board's order is therefore erroneous and should be set aside.

II.

The Evidence Is Insufficient to Support the Board's Order.

The Board found that there was no actual majority as of July 21, 1958, because 123 and 208 were together seeking to represent the employees at a time when a majority of the employees had signed cards designating 123 alone. This finding overlooked the uncontradicted evidence, first, that the two unions were in fact acting jointly in organizing the employees, and, second, that the organizational efforts were carried on in such a way as to generally apprise the employees of this fact. The Board disregards completely its long-established rule that two or more unions may bargain jointly and that where unions seek such joint bargaining the collective bargaining designations for the two may be totalled in determining the representation status of the two unions jointly. *Bailey Department Stores Co.,* 120 NLRB No. 118; *Vanadium Corp. of America,* 117 NLRB 1390; *Transport Co. of Texas,* 111 NLRB 884.

In *J. J. Moreay & Son, Inc.,* 107 NLRB 999, Footnote 3, the Board said:

> "Nor do we find merit in the employer's further objections to this petition based on the fact that authorization cards signed on behalf of Furniture and Finishers Local Union No. 980, AFL, do not

also authorize United Brotherhood of Carpenters & Joiners of America, AFL, to act for the employees involved. . . ."

Nekoosa-Edwards Paper Co., 11 NLRB 446, presented a situation identical with that at Bar. There, the local unions of three different national unions jointly organized the plant and sought to bargain jointly as the representative of the employees in a specified unit. The employees joined one or another individual local union. The Board held that "in joining the individual organizations the employees designated one agency composed of the three organizations . . . to represent them in collective bargaining with representation". The employer was held to be required to deal with the three unions jointly, on the basis of their showing that a majority of the employees involved had designated one or another of the three unions which were acting together.

In the light of the joint organizational efforts and the seeking of joint bargaining by the two unions, the designations signed on behalf of 123 must be considered as jointly designating the two unions. The authorities do not condition this conclusion upon proof that each employee who signed a card designating the union had knowledge of the joint organization drive. The employee does secure the representation of the union he designates, even though that union has chosen to work jointly with another. In any event, the evidence here indicates that the employees did have knowledge of the joint organizing drive.

As to the majority status of the unions, there is no dispute that on July 21, 1958, 33 authorization cards had been signed by Sierra employees in the appropriate

unit. This number constituted a majority of the total of 60 employees in that unit.

The record establishes without contradiction that, prior to the July 22nd strike, 123 demanded joint bargaining on behalf of itself and 208, and that the employer, took the position that, because of its dislike for 123 it would not bargain. A refusal to bargain for such a reason, is illegal. *NLRB v. Elsco Manufacturing, Inc.,* 227 F. 2d 675; *B. V. D. Co.,* 110 NLRB 1412; *White's Uvalda Mines,* 117 NLRB 1128; *Darlington Veneer Co., Inc.,* 113 NLRB 1101; *Knight-Morely Corp.,* 116 NLRB 140, 251 F. 2d 753, cert. denied 357 U. S. 927.

In addition to this unfair labor practice, there was the conduct of the employer, beginning a few days before the refusal to bargain, and continuing thereafter, which the Regional Board found to be an interference with the employees' freedom of choice. These occurrences culminating in the refusal to bargain on July 21, were the obvious causes of the strike on July 22.

The refusal to bargain is clear. In fact, the failure of the employer to make any request for a check of the authorization cards is itself evidence of a lack of good faith. *NLRB v. Hunter Engineering Co.,* 215 F. 2d 917; *NLRB v. Knickerbocker,* 218 F. 2d 917; *NLRB v. Kobritz,* 193 F. 2d 8; *NLRB v. Clearfield Cheese Co., Inc.,* 213 F. 2d 70-74; *Cottage Bakers,* 120 NLRB 99.

Where there has been a refusal to bargain, and a strike ensues thereform as well as from other unfair labor practices, as it did here, the resulting strike is an unfair labor practice strike. Therefore, the striking workers cannot be permanently replaced during the strike and the duty to bargain continues. *NLRB v. Elsco*

Mfg., Inc., 227 F. 2d 675; *B. V. D. Co., supra; White's Uvalda Mines, supra; Darlington Veneer Co., supra; Knight-Morely Corp., supra.* Once the employer unawfully refuses to bargain, his duty to bargain continues from the date of his refusal and on into the period of the strike.

Even where the majority was lost by reason of "a change of personnel occurring in the normal course of business" it did not relieve the company of its duty to bargain with the unions. *Superior Engraving Co. v. NLRB,* 183 F. 2d 783.

In this case the unions had a majority before the strike began. When the unfair labor practice strike began, five of the 33 employees who had designated the union went through the picket lines and naturally occupied a position adverse to that of the very union which they had previously designated as their collective bargaining representative. This apparent loss of majority does not lessen the unions' continuing right to recognition and bargaining. Such a loss of majority is conclusively presumed to have been caused by the preceding unfair labor practice. *Supreme Engraving Co.,* 83 NLRB 215; *Dallas Concrete Co.,* 102 NLRB No. 122; *Continental Desk Co.,* 104 NLRB No. 114; *Cf. Gebhardt Chili Powder Co.,* 120 NLRB 190.

This circuit applies the same rule in this respect. *NLRB v. Trimfit of California Co.* (CA 9), 211 F. 2d 210; *NLRB v. Idaho Egg Producers* (CA 9), 229 F. 2d 821, 823.

Thus, the unions' continued status as bargaining agent for these employees is to be measured by a count of the authorization cards and the payroll of July 21,

already made by the Board, establishing that a majority of the employees had signed designation cards.

Here the burden of disproving the majority is on the Board in a case in which the unions have, in effect, met the burden of proving their majority with sufficient clarity to warrant an 8(a)(5) order in their favor. Even if the record were less clear, the Board would not have sustained its burden of proof in this case.

The essential prerequisites of a showing of good faith questioning of a majority by an employer are lacking here. As is noted in *NLRB v. Henry Heide, Inc.,* 219 F. 2d 46, 48, one of these is that the challenge of the claim of majority representation "must *not* have been raised in a context of illegal anti-union activity." (Emphasis from the Opinion.) Hence the raising of the question of a majority by the employer occurred in the context of a prior unequivocal refusal to deal with 123, and after an unfair labor practice strike had begun. According to the cited case, any "other conduct by the employer aimed at causing disaffections from the union" is also a bar to a claim of good faith by an employer. Here a refusal to bargain with 123 occurred in a context of company activity "aimed at causing disaffections from the union."

Perhaps the clearest statement of the law applicable here is found in *NLRB v. Hamilton,* 220 F. 2d 492, 494:

> "An employer may withhold recognition from a union which claims to represent a majority of his

employees only if he in good faith doubts the union's claims. If the refusal to bargain is the result of a good faith doubt and not a defense to unionization, the employer has the right to have those doubts settled by an election."

The "disclaimer" by Local 123 did not relieve the employer of its duty to bargain with the two unions jointly. The evidence is uncontradicted that 123 submitted the "disclaimer" because of the position taken by the company that it never would deal with that union. But the two unions wanted to terminate the strike as soon as possible and their major objective had been to act jointly in representing the employees. All that was done by the disclaimer was to surrender the formality of such joint recognition. The situation in all practical respects so far as joint representation of the workers was concerned continued unchanged.

The purpose of the "disclaimer" was to avoid the unfair labor practices of the company and to secure the legal rights to which the two unions were entitled, not only on behalf of themselves but also on behalf of the majority of the employees who had designated them as their collective bargaining representative. 123 waived a legal right supported not only by specific statutory provisions but by public policy and did this because of the illegal pressures resulting from the company's violation of the statute on which the unions' rights were based. A waiver which is obtained or procured by duress is ineffective. *Panther Rubber Manufacturing Co. v. Comm of Internal Revenue,* 45 F. 2d 314.

The Board has not hesitated to disregard the stated positions of parties and surface appearances in order to effectuate the purposes of the act. Thus the Board has treated an employee's quitting of his job as a constructive discharge. In *Bausch & Lomb Optical Co. v. NLRB* (CA 2), 35 LRRM 2169, an employee and the president of the union dealing with the particular employer quit his job after the employer transferred him from his regular job to one paying about one-third of his former wages. It was held that this was a constructive discharge and should be treated as such despite the fact that the employee had actually quit upon being transferred. To the same effect see *Sterling Corset Co.*, 9 NLRB 858; *NLRB v. Saxe-Glassman Shoe Co.* (CA 1), 31 LRRM 2271; *Olin Industries, Inc.*, 97 NLRB 26; *Lingerie, Inc.*, 101 NLRB 221; *Polynesian Arts, Inc.*, 100 NLRB 86; *NLRB v. Associated Wholesale Grocery* (USC 5), 43 LRRM 2382.

In another series of cases involving employers who have told strikers that they must "return or be fired" the ultimatum was regarded by the Board as not being a dismissal; rather it was treated as a tactical subterfuge to induce the strikers to return to work. *Majestic Mfg. Co. v. AFL*, 64 NLRB 950; *Matter of American Mfg. Concern*, 7 NLRB 1297; *Matter of Biles-Coleman Rubber Co.*, 4 NLRB 679; *Roanoke Public Warehouse*, 19 LRRM 1267; *Columbia Pictures Corp.*, 82 NLRB 568.

Here, too, the disclaimer should be treated for what it actually was—a device by which the union sought to render the employer's unfair labor practices ineffective as a practical matter. There was no intent to ac-

ually abandon the right to represent the employees. To the contrary, under the particular circumstances of his case, the disclaimer was a means for securing the exact opposite of what it appeared to be—the very representation which was "disclaimed".

Finally on this score, if the "disclaimer" is given effect the employer here will obtain the full benefit of its own violation of the law. This would contravene the basic principle recognized in law, equity and administrative proceedings that no one should be permitted to take advantage of his own wrong. *Cf., California Civil Code,* Section 3517.

It thus appears that the record is entirely insufficient to support the Board's order.

III.

In View of the Addition of Paragraph 7 to Section 8(b) of the Act the Board's Order Should Not Be Enforced.

When the Board issued its order, Section 8(b) of the Act did not contain a seventh paragraph. Subsequently Section 8(b) was amended by Congress by Section 704(c) of the Labor Management Reporting and Disclosure Act of 1959. Said Section 704(c) added to Section 8(b) of the Act a seventh paragraph. (29 USC 158(b)(7).[4]

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[4]"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organ-

The new Section 8(b)(7) of the Act outlines a broad overall scheme for handling all picketing by labor organizations which have as *an* object the achievement of recognition by the picketed employer. Said Section 8(b)(7) provides standards and procedures for dealing with all such picketing situations.

The Board's order if enforced will impede the application and administration of the new amendment with respect to the picketing problem involved in the instant case. The applicable principle has been most recently stated in *System Federation No. 91 etc. v. Wright, et*

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ization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce an individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b)."

. (No. 48, October Term, 1960), ... U. S. ..... That ase involved a consent decree and injunction order of District Court which in effect denied a railway union ie right to seek a union shop. At the time of the)istrict Court's order, union shops were statutorily unvailable to railway unions pursuant to Section 2 of ie Railway Labor Act (45 USC §152). Subsequently Congress amended the Act to permit union shops under ertain conditions (45 USC §152 Eleventh). Thereifter the railway union sought modification of the inunction. The Supreme Court granted the modificaion on the ground that it was the Railway Labor Act vhich the District Court had served in entering the lecree, and only incidentally the parties. The Act havng been amended by Congress, it was held that the ourt could not be required to continue enforcement of ights the statute no longer gave.

The changes in Section 8(b) of the Act embodied n new paragraph (7), when viewed in the light of he *System Federation* case, *supra,* suggest that the Board's order should not now be enforced. Rather, the ntire matter of respondents' rights and obligations to picket Sierra should be handled without interference in the manner in which Congress has prescribed in Section 8(b)(7) of the Act. It is the function of the Board to serve the National Labor Relations Act, just as it was the duty of the District Court, in the *System Federation* case, to serve the Railway Labor Act, and not the parties.

Conclusion.

For all of the reasons above stated, the Board's petition should be denied.

Respectfully submitted,

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